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TELEPHONE

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July 16, 2014

The Honorable Carlos A. Samour, Jr.
18th Judicial District
Arapahoe County District Court
Arapahoe County Courthouse
7325 South Potomac Street
Centennial, CO 80112

REDACTED

RE: Defendant: James Eagan Holmes
District Court of: Arapahoe County
Criminal Action No: 2012CR1522, Division 26

Dear Judge Samour:

This correspondence is submitted in response to the Court's Order Regarding Notice to Set a Hearing on Motion D-221 (D-222), and defense counsel's Motion for Court Order Prohibiting the New Sanity Examiner from Videotaping Mr. Holmes's Second Sanity Examination and Request to Stay Any Videotaping of [REDACTED] Examination of Mr. Holmes Until the Court Rules On This Issue (D-221).

As stated in CMHIP's July 7, 2014 correspondence (C-113), I have performed over two dozen sanity examinations in death penalty cases. My response does not address CMHIP's regular practice or their doctors' methods in conducting examinations. My regular practice includes videotaping sanity examinations, which is based on my substantial experience conducting such examinations and my independent medical judgment of appropriateness and necessity. Specifically, I routinely videotape sanity examinations for the following reasons:

- It allows me to attend to the defendant directly and continuously, with eyes, ears, and mind, without the distraction of taking notes.
- It allows for a more natural flow of the interview(s), without interruptions or delays while I pause to take notes.
- It reassures the defendant that I am trying to do an honest job, and will not misconstrue his statements in biased, misunderstood, or incomplete handwritten notes.
- It preserves, or at least protects and illustrates, the defendant's right to an open and honest examination, which will not be obscured or sabotaged by either conscious or unconscious bias, or error in note-taking or memory, on my part.
- It produces a record that memorializes more than just the defendants' words (e.g., in audio-only recordings or reporter transcripts), but also demeanor, facial expression, posture, behavior, nuance, etc., which are useful for me in analyzing the evaluation and reaching a conclusion concerning the question the evaluation is intended to answer.

- If physical tasks are included (such as asking the defendant to perform simple neurological tests or to draw something), it records the process, not just the result. This may include videotaping psychological testing; however, I do not require such testing to be a part of the videotaping.
- It reduces error, producing a far more accurate record than written notes.
- It allows a far more accurate after-the-fact reference for me when composing reports or preparing for testimony.

I have opined more extensively on the issue of videotaping in the publication [REDACTED]

The publication received the [REDACTED]

[REDACTED] An excerpt from the book is attached for the Court's information.

Notably, many of the reasons for videotaping are similar to those for videotaping various types of law enforcement interviews and interrogations.

Having conducted numerous videotaped sanity examinations, I have established a standardized procedure, which meets both logistic and clinical needs. First and foremost, the recording is not to be surreptitious. It will be divulged and explained as part of my usual initial introduction, general information sheet, and disclaimer. In addition, both parties (defense and prosecution) and the Court will have complete knowledge of the process and the fact of the recording. I utilize a professional videographer, whose services will be secured by CMHIP in this case. This ensures that: 1) the process and video are protected by chain-of-custody or similar safeguards over the course of the examination; 2) there is less chance of a technical problem; 3) the video and audio quality are high; 4) and the videographer is unrelated to either side in the case. Logistically, the camera is unattended, with the videographer checking only to change the recording medium and/or ensure the camera is working. The videographer would agree to maintain the confidentiality of the examination. Finally, the process and the recording itself are certified by the videographer for evidentiary purposes. Given the high-profile and sensitive nature of this case, I would retain the original and one copy of the completed video. No other copies would be created unless specifically requested and authorized by the Court. As stated in CMHIP's July 7, 2014 letter (C-113), I do not object to a protective order prohibiting the videotape from being distributed to either party, or to an order requiring destruction of the video after the report is complete.

On occasion, I have been asked to respond to objections to videotaping. Common objections and my responses include the following:

It may color the examinee's responses. Decades of experience by hundreds or thousands of clinicians, with both video- and audio recording of interviews, in forensic, clinical, and clinical training settings, indicates that evaluatees and patients usually ignore the recording process, particularly if it is unobtrusive. In this case, the defendant will be aware of who I am, for whom I work (the Court), and the possible uses to which the examination findings may be put.

*Certification in general and forensic psychiatry by the American Board of Psychiatry & Neurology
 Certification in psychiatric administration & management by the American Psychiatric Association (TSBME Rule 164.4)

Examinees may think they are being recorded for nefarious purposes. This sometimes occurs. Many, perhaps most, people who are suspicious of being examined by a forensic psychiatrist – especially one who may testify on behalf of the opposition at some point – are reassured by the fact that the process is being recorded, and their lawyers may have access to the recording.

It may be noted that simply taking notes is also a form of “recording,” but is far more vulnerable to personal error or misuse, intentional or unintentional, than is a properly maintained video.

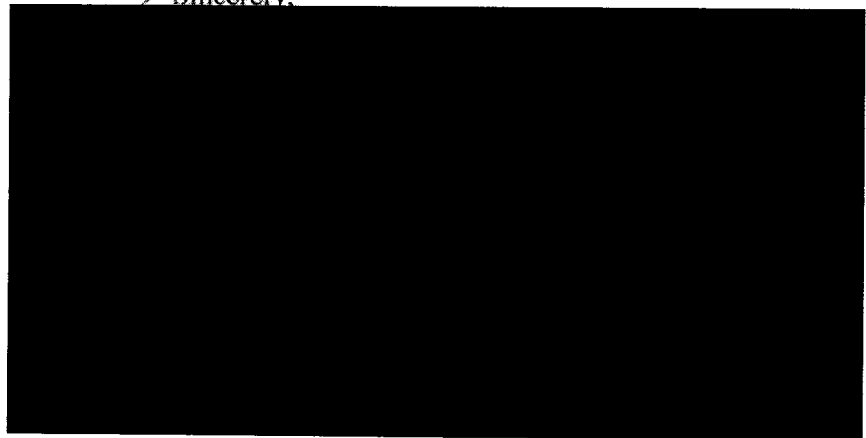
Introducing a recorder may distract the defendant and/or the examination process.

Unobtrusive video cameras are rarely distracting. CMHIP has assured me that the videographer will not be present in the examination room.

In this case, the defendant has been videotaped 24 hours a day, 7 days a week, since the time he was detained. Every interview he has participated in with law enforcement has been videotaped. As such, it is unlikely that the presence of an unobtrusive video camera in the evaluation would be distracting, unfamiliar, or obtrusive to him.

I believe the foregoing information responds to each of the non-legal questions/issued in defense counsel’s Motion D-221, leaving the legal issues for discussion and determination by both counsel and this Court. To the extent that there are questions or issues which remain unanswered, or if this Court seeks elaboration on any point made in this letter, I welcome further discussion during the July 22, 2014 hearing.

Sincerely,

A large black rectangular redaction box covering the signature and name of the sender.

cc: Dr. Birgit Fisher, Interim Superintendent, Colorado Mental Health Institute at Pueblo
Daniel King, Chief Deputy Public Defender
Tamara Brady, Chief Deputy Public Defender
Kristen Nelson, Deputy Public Defender
Karen Pearson, Chief Trial Deputy District Attorney
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